



# Correspondence Management System

Control Number: R10-07-000-3927

Printing Date: March 07, 2007



## Citizen Information

**Citizen/Originator:** Smith, Senator Gordon

**Organization:** U.S. Senate

**Address:** Jager Building 116 S. Main Street, Portland, OR 97801

**Constituent:** N/A

**Committee:** N/A

**Sub-Committee:** N/A

## Control Information

**Control Number:** R10-07-000-3927

**Alternate Number:** N/A

**Status:** Appropriate Action

**Closed Date:** N/A

**Due Date:** Mar 20, 2007

**# of Extensions:** 0

**Letter Date:** Mar 1, 2007

**Received Date:** Mar 6, 2007

**Addressee:** Regional Administrator

**Addressee Org:** USEPA Region 10

**Contact Type:** LTR (Letter)

**Priority Code:** Normal

**Signature:** N/A

**Signature Date:** Mar 20, 2007

**File Code:** FOR SIGNATURE

**Subject:** LETTER FOR OREGON SENATOR GORDON SMITH REGARDING CONSTITUENT COMPLAINT (BRIDGEVIEW VINEYARDS)

**Instructions:** PROVIDE RESPONSE FOR RA SIGNATURE AND SUBMIT TO RA OFFICE NO LATER THAN THREE DAYS BEFORE DEADLINE TO ALLOW FOR ADEQUATE PROCESSING

**Instruction Note:** N/A

**General Notes:** N/A

**CC:** N/A

## Lead Information

**Lead Author:** N/A

### Lead Assignments:

Assigner	Office	Assignee	Assigned Date	Due Date	Complete Date
John Schaub	R10	R10-OETPA	Mar 7, 2007	Mar 20, 2007	N/A
	<b>Instruction:</b> N/A				

## Supporting Information

**Supporting Author:** N/A

### Supporting Assignments:

Assigner	Office	Assignee	Assigned Date
No Record Found.			

## History

Action By	Office	Action	Date
John Schaub	R10	Assign R10-OCE as lead office	Mar 6, 2007



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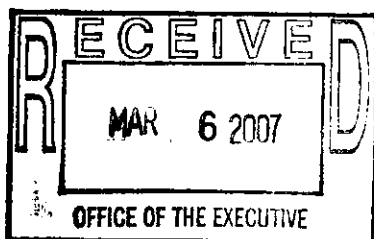


Action By	Office	Action	Date
John Schaub	R10	Retracted Assignment	Mar 7, 2007
John Schaub	R10	Assign R10-OETPA as lead office	Mar 7, 2007

## Comments

Commentator	Comment	Date
No Record Found.		

GORDON H. SMITH  
OREGON



# United States Senate

WASHINGTON, DC 20510-3704

March 1, 2007

COMMITTEES:  
FINANCE

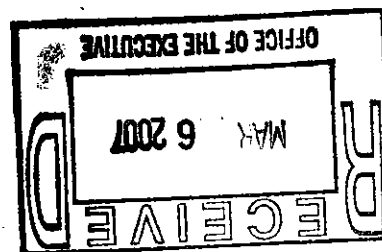
COMMERCE, SCIENCE, AND TRANSPORTATION

ENERGY AND NATURAL RESOURCES

INDIAN AFFAIRS

RANKING MEMBER, SPECIAL COMMITTEE ON AGING

Regional Administrator, Region 10  
Environmental Protection Agency  
1200 S.W. 6th Avenue  
Seattle, WA 98101



Dear Friend:

Please find enclosed a copy of a letter I recently received from Robert Kerivan regarding concerns about fines he paid which may not have been within the jurisdiction of the EPA and Corps of Engineers. In an effort to provide my constituent with an appropriate reply, I would be grateful for your thorough review of this situation and appreciate any information you could provide regarding this matter.

After you have completed your review, please send your findings and comments to my Portland office at One World Trade Center, 121 SW Salmon Street, Suite 1250, Portland, Oregon 97204.

Thank you in advance for your prompt attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "G. H. Smith".

Gordon H. Smith  
United States Senator

GHS:mh  
Enclosure

# BRIDGEVIEW VINEYARDS

January 30, 2007

Senator Gordon Smith  
Jager Building  
116 S Main Street, Suite 3  
Pendleton, OR 97801

Dear Senator Smith,

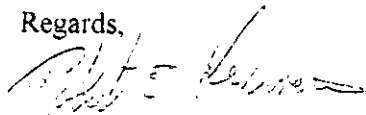
I have been having problems with the EPA and the Corp of Engineers since 2003 because I tried to protect my home and my land from floating down the river. It all started after the 1998 flood when the Oregon Division of State Lands (DSL) and Oregon State Police arrested me under criminal law. I went to court and was acquitted of the charges. I then filed a civil suit and received an injunction against the DSL from the judge of the second trial under civil law. At that trial the judge told the DSL in giving me the injunction to allow Mr. Kerivan to repair his land, as you would have to be a blind man not to see the damage caused by the river. Then Ann Hanas, head of the DSL, turned my company and me in to the EPA and the Corp of Engineers.

Now comes my problem. Enclosed is a letter dated March 25, 2005, fining my company and me \$25,000.00. After spending \$500,000 plus in lawyer's fees protecting myself from the State of Oregon, I then had to spend another \$46,000 in lawyer's fees to fight the EPA and the Corp. I finally had to give up and paid a reduced fine of \$11,000, but did not admit to any guilt. Of course, all of these lawyer's fees were deducted as a business expense on my IRS tax return. However, I had to agree not to deduct the \$11,000 fine as a business expense.

Now I have received a letter from my attorney and a copy of an interim guidance memo to all the Corp leaders and EPA leaders from the Corp of Engineers HQ02 regarding the Rapanos and Carabell U.S. Supreme Court case. As you can see this memo, dated July 5, 2006, states to wait and delay making any "jurisdictional determinations for areas beyond the limits of the traditional navigable waters (i.e. outside the "Section 10" waters) for the next three weeks". In calling the EPA yesterday, January 29, 2007, I was informed that they, the EPA, are still waiting for that jurisdictional determination. We have argued all along that the EPA and the Corp do not have jurisdiction over nonnavigable or intrastate rivers.

I would like to get my money back for the \$11,000 fine and maybe even the \$46,000 in lawyer's fees without going to court again, as I am 80 years old and because of my age I am in a hurry. Please see what you can do. At least get them to stop picking on farmers.

Regards,



Robert E. Kerivan  
President



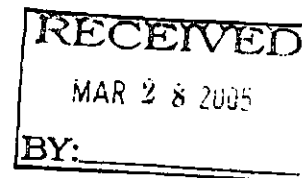
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10  
1200 Sixth Avenue  
Seattle, Washington 98101

8 5 MAR 2005

Reply To  
Attn Of: ETPA-083

**CERTIFIED MAIL-RETURN RECEIPT REQUESTED**

Robert E. Kerivan, President  
Bridgeview Vineyards, Inc.  
4210 Holland Loop Road  
PO Box 609  
Cave Junction, OR 97523



Re: Robert E. Kerivan and Bridgeview Vineyards, Inc.  
Administrative Complaint  
Docket No. CWA-10-2005-0124

Dear Mr. Kerivan:

Enclosed is a copy of an Administrative Complaint that the U.S. Environmental Protection Agency (EPA) has filed against you pursuant to Section 309(g)(2)(B) of the Clean Water Act (Act), 33 U.S.C. § 1319(g)(2)(B). In the Complaint, EPA alleges that you unlawfully discharged dredged and/or fill material into waters of the United States without a permit in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a). EPA proposes that a penalty of \$25,000 be assessed against you for the violations alleged.

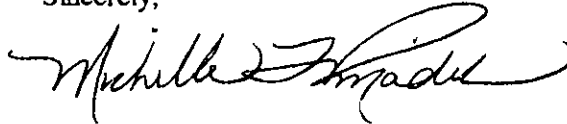
As described more fully in the Complaint, you have the right to request a hearing to contest the factual allegations and/or the penalty proposed in the Complaint. A copy of the Consolidated Rules of Practice in 40 C.F.R. Part 22 (Part 22 Rules), which govern this proceeding, is enclosed. Please note the requirements for filing an Answer in §§22.15 and 22.17. If you wish to contest the allegations and/or the penalty proposed in the Complaint, then within 30 days of receipt of the enclosed Complaint, you must file an Answer with the EPA Regional Hearing Clerk at the following address:

Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 10  
1200 Sixth Avenue, Mail Stop ORC-158  
Seattle, Washington 98101

If you do not file an Answer within 30 days, you may be held in default. If a default order is entered against you, then each allegation in the Complaint will be deemed to be admitted as true and you will have waived the right to a hearing or to be notified of any EPA proceedings that occur before a civil penalty may be imposed. Upon default, the Presiding Officer may find you liable for the full civil penalty proposed in the Complaint.

You have the right to be represented by an attorney at any stage of the proceedings, including any informal discussions with EPA. If you have any questions, would like to discuss a settlement of this matter through an informal conference, or would like to receive an extension of the 30-day deadline to file an Answer in order to discuss settlement of this case, please have your attorney contact Deborah Hilsman, Assistant Regional Counsel, at (206) 553-1810.

Sincerely,

A handwritten signature in cursive script, appearing to read "Michelle Pirzadeh".

Michelle Pirzadeh, Director  
Office of Ecosystems, Tribal and Public Affairs

Enclosures

cc:

Clarence Greenwood, Esq.

Don Borda, U.S. Army Corps of Engineers, Portland District

Anne Haus, Oregon Division of State Lands

**Tim Woodhead**

**From:** Clarence H. Greenwood [chg@bhlaw.com]

**Sent:** Wednesday, January 24, 2007 2:31 PM

**To:** bvw

**Subject:** Waters of the United States

Bob I have been working on a case in the Woodburn area. In the process, I have revisited this issue because the Corp and EPA are trying to nail the poor farmer for doing repair work on his farm. This is a very ugly case (criminal sanctions – jail time and fines as well as the civil fines that are to follow). Other lawyers handled case initially and they went a long way toward caving, before I became involved

I attach the following:

- 1) copy of 33 CFR 328.3(a) which is the corps regulatory definition of waters of the United States. You will note that it subpart (3)(i)-(iii) that covers isolated waters (this is so broad that it could cover your and my bathroom). You will note subpart (5) covers tributaries (which under the pre Rapanos corp position extended into your bathroom). You will also note subpart (8) which contains the out for "prior converted wetlands".
- 2) copy of 7 CFR 12.2 which is the NRCS's regulatory definitions. You will note that subpart 8 defines "prior converted croplands" a term that appears subpart (8) of the corps definition of waters. The corp has announced it will follow the NRCS definition. Note that the sole difference between farmed wetlands and prior converted wetlands is the number of days of inundation (not saturation) during the growing season.
- 3) A copy of the Corp (and EPA's) regulatory guidance issued on January 15, 2003 stating their position on Clean Water Act authority after the Supreme court's decision in Solid Waste Agency of North Cook county (Swancc). They admit in this that the 4<sup>th</sup> Circuit and Supreme Court had both declared subpart (3)(i)-(iii) (the isolated waters part of the definition) invalid. However, in the tributaries discussion they still assert expansive authority over intrastate nonnavigable waters (such as sucker creek). They admit in this guidance that the 5<sup>th</sup> circuit did not agree with that position. And they note that the US District court in the Eastern District of Michigan had ruled against their expansive view of their authority in a case called Rapanos. We all know that this case ultimately went to the US Supreme court and that the District court's ruling was approved. Thus after the US Supreme court's Rapanos decision, the corps (and EPAs) expansive assertion of authority over intrastate nonnavigable streams and remote wetlands has been limited
- 4) a July 5, 2006 internal guidance issued by the corp's headquarters office after the Rapanos case was announced. Note this is internal guidance (not a published as a formal guidance such as the January 15, 2003 guidance). In this document the corp essentially concedes that they do not have jurisdiction under the Clean Water Act over intrastate nonnavigable streams and remote wetlands.
- 5) Finally, I attach a listing of navigable waters in Oregon.

With this info you know more than the local field agents for the Corp or EPA. You will also note in the January 15, 2003 guidance, if the corp's agent's assert jurisdiction over intrastate nonnavigable streams or remote wetlands, they are to seek project specific Headquarters approval of the jurisdictional determination. The local Portland District has not been obeying this command

I submit, that in the future, the first question a person who is located on an intrastate nonnavigable water, with a remote wetland allegation, should ask the field agent is for a copy of their jurisdictional determination. If they do not have one (as required under the January 15, 2003 guidance), the owner has the right to deny them access until they provide such a document. Without such a determination they have no authority under the Clean Water Act.

This for your info. The cost is get after Lynn and the Farm Bureau to get a listing of the DSL legislation in the current legislature. We cannot let DSL seek thru legislation enacting SB 172 now that we have won this battle at the federal level and the state level (assuming the Court does rule some day). That is the only way out for them at this time.

503-8085150

Corps of Engineers

From: Sudol, Mark F HQ02  
Sent: Wednesday, July 05, 2006 10:25 AM  
To: CDL-REG-All; CDL-REG-CHIEFS; CDL-REG-MS; CDL-REG-ROs  
Cc: Barnes, Gerald W HQ02; Smith, Chip R HQDA; Wood, Lance D HQ02;  
Stockdale, Earl H HQ02; 'Schmauder, Craig R Mr OGC'; Dunlop,  
George S HQDA; Sherman, Rennie H HQ02; Cummings, Ellen M HQ02  
Subject: Interim Guidance on the Rapanos and Carabell Supreme  
Court Decision

Holthead

503  
8085388

Everyone,

The Supreme Court handed down a decision on June 19, 2006, in the Rapanos and Carabell cases. That decision addresses the scope of Clean Water Act (CWA) jurisdiction over certain waters of the United States, including wetlands. I appreciate the difficulty you are facing in trying to keep an on-going program functioning in the face of the present uncertainty. Given the confusion created by the differing opinions that the Supreme Court justices filed in that case, it will take some time for the Corps and the EPA to analyze and reach consensus on what legal guidance is to be derived from the decision. In the near future we intend to issue joint EPA/Army guidance clarifying CWA jurisdiction in light of the Rapanos/Carabell decision.

We anticipate that the Rapanos/Carabell decision will lead the Corps and the EPA to make some changes in how we describe and document the justifications that underlie some of our CWA jurisdictional determinations (JDs). In other words, the tests that we cite and the facts that we document in some of our JD administrative records will probably change somewhat, to insure that our JDs reflect the Supreme Court's most recent legal tests for asserting CWA jurisdiction. We will try to send you our advice in this regard as soon as possible and in the very near future.

In the meantime, in order to allow the Corps and EPA to prepare and issue substantive guidance, I am recommending that, to the extent circumstances allow, you delay making CWA jurisdictional determinations for areas beyond the limits of the traditional navigable waters (i.e., outside the "Section 10" waters) for the next three weeks. Even though you should delay making CWA jurisdictional calls in areas outside the traditional navigable waters for the next three weeks, that does not mean that the processing and issuance of CWA permit authorizations in those areas using general permits and standard individual permits should be delayed, as is further explained below.

I also recommend that, until that substantive guidance is circulated, no Corps District or Division Office should announce or implement any change in (1) how we are documenting our jurisdictional determinations, or (2) regarding the areas over which we are asserting CWA jurisdiction, without prior coordination with and concurrence by Headquarters Regulatory Community of Practice and Headquarters Office of the Chief Counsel.



Until Corps Headquarters issues substantive guidance regarding the Rapanos/Carabell decision, Corps personnel should not represent any Corps position on the effect of these decisions on Clean Water Act jurisdiction in court pleadings or in any sort of dealings with outside parties. Therefore, in situations that require taking a position on the scope of "waters of the US" under the Clean Water Act, e.g. briefs or other filings in judicial or administrative proceedings, you should defer action if possible. We recommend seeking an extension for any briefs due in administrative or judicial cases in the near term. By way of example, the U.S. sought an extension of 60 days for a brief in *United States v. Cundiff*, Nos. 05-5469 and 05-5905 (6th Cir.) due June 21st. Ongoing work in Clean Water Act cases, such as settlement negotiation meetings or inspections, should continue if that work does not require taking a position on the legal issues of CWA jurisdiction addressed by the Supreme Court's Rapanos/Carabell decision.

Similarly, during the period until we issue substantive guidance on how to implement the Rapanos/Carabell decision, you should not refer any new regulatory enforcement actions to the Department of Justice other than those involving illegal activities in or affecting traditionally navigable (Section 10) waters, or violation of the terms or conditions of Corps permits covering activities in Section 10 waters. If illegal discharges of dredged or fill material in other waters are causing significant, immediate environmental harm and would justify injunctive relief, notify CECC-L (Martin Cohen) and we will determine an appropriate response on a case by case basis.

Regarding the issuance of permit authorizations during the period before we issue substantive guidance on Rapanos/Carabell, all forms of Section 10 and CWA Section 404 permit authorizations for activities proposed to take place in the traditional navigable waters (i.e., the Section 10 waters) should continue to be issued as before, since the Rapanos/Carabell decision does not affect Section 10 of the Rivers and Harbors Act of 1899 at all, and does not affect CWA jurisdiction over any category of Section 10 waters. In waters other than the traditional navigable

(Section 10) waters, where a permit applicant proposes to conduct an activity involving the discharge of dredged or fill material pursuant to any form of CWA general permit authorization (e.g., NWP, regional general permit, SPGP, etc.), the Corps will continue to authorize those activities using applicable general permits, recognizing that such a permit applicant has the right to seek a modification of the terms and conditions or such a general permit authorization at a later time, as explained below.

Regarding applications for standard individual permits under CWA Section 404 covering activities involving the discharge of dredged or fill material outside the limits of the traditional navigable (Section 10) waters, as a general matter we expect that those individual Section 404 permits will continue to be issued as expeditiously as is practicable, to meet the legitimate needs of permit applicants, during the next few weeks while we are preparing substantive "Rapanos/Carabell guidance." The primary exception to that general rule might be for any individual Section

404 permit covering activities outside the traditional navigable waters where permit issuance is feasible during the next few weeks, but where special conditions of the proffered permit would require the permittee to provide compensatory mitigation, and where that permittee might believe that some or all of his activities are now not subject to regulation under CWA Section 404 because of the Rapanos/Carabell decision, and thus that the mitigation requirements of the permit are excessive or unnecessary. In such a circumstance the Corps should inform the permit applicant that he or she has a number of options, as follows: The permit applicant can accept and sign the proffered permit now, with its existing terms and conditions; or the permit applicant can ask for a delay in the issuance of the permit until the Corps District has received substantive Rapanos/Carabell guidance from Corps Headquarters, so that the amount of required compensatory mitigation can be re-evaluated (if appropriate) based on that new guidance.

For Corps CWA Section 404 permit authorizations made during the next few weeks for activities outside the traditional navigable waters pursuant to either a general permit or a standard individual permits, where the permittee later concludes that the terms or conditions of that permit authorization are inappropriate in light of the Rapanos/Carabell decision, that permittee can ask the Corps to modify the terms or conditions of that permit to rectify the matter subsequent to the issuance of the anticipated EPA/Army substantive Rapanos/Carabell guidance.

Corps Headquarters POCs are Mark Sudol and Russ Kaiser (Regulatory COP), Lance Wood (CCE), and, for litigation and enforcement matters, Martin Cohen (CCL).

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#### EPA INTERIM GUIDANCE

##### Initial Guidance on Supreme Court's Wetlands Decision

As you know, on June 19th the Supreme Court issued a decision in the consolidated wetlands cases. OGC, OECA, and OW are studying the opinions and do not yet have an Agency position on them. In the very near future, we intend to issue guidance on how the Agency should proceed in light of the decision. Until then, Agency personnel should not represent an Agency position on the effect of this decision on Clean Water Act jurisdiction in pleadings or in dealings with outside parties.

Therefore, in situations that require taking a position on the scope of "waters of the US" under the Clean Water Act, e.g. briefs or other filings in judicial or administrative proceedings, you should defer action if possible. We recommend seeking an extension for any briefs due in administrative or judicial cases in the near term. By way of example, the U.S. sought an extension of 60 days for a brief in *United States v. Cundiff*, Nos. 05-5469 and 05-5905 (6th Cir.) due June 21st.

Ongoing work in Clean Water Act cases, such as settlement negotiation meetings or inspections, should continue if that work does not require



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**REGION 10**  
1200 Sixth Avenue  
Seattle, WA 98101

MAR 27 2007

Reply To  
Attn Of: RA-140

Honorable Gordon H. Smith  
United States Senate  
One World Trade Center  
121 SW Salmon Street, Suite 1250  
Portland, Oregon 97204

Re: In the matter of: Robert E. Kerivan and Bridgeview Vineyards, Inc.  
EPA Docket No. CWA-10-2005-0124

Dear Senator Smith:

This responds to your letter dated March 1, 2007, concerning the enforcement action brought by the U.S. Environmental Protection Agency (EPA) against Robert Kerivan and Bridgeview Vineyards, Inc. As your constituent, Robert Kerivan, indicated in his letter to you dated January 30, 2007, EPA filed an administrative complaint against Mr. Kerivan and Bridgeview Vineyards, Inc. on March 25, 2005. In the complaint, EPA alleged that in 2002, Mr. Kerivan and Bridgeview Vineyards, Inc. violated Section 301 of the Clean Water Act by discharging dredged and/or fill material into the active channel and floodplains of Sucker Creek without authorization. Sucker Creek is a tributary of the East Fork of the Illinois River which was designated as critical habitat for Southern Oregon/Northern California Coho salmon. In the complaint, EPA proposed a penalty payment of \$25,000.

After several months of negotiations with Mr. Kerivan and his attorney and after Mr. Kerivan documented that he had corrected the violation, EPA agreed to settle the case for a penalty payment of \$11,000. Mr. Kerivan signed a Consent Agreement memorializing this settlement on October 3, 2005. After those who had commented on the administrative complaint were provided with an opportunity to comment on or object to the Consent Agreement, a Final Order resolving EPA's claims was signed by the Regional Administrator and filed on December 20, 2005. A copy of the Consent Agreement and Final Order is enclosed with this letter. Among other things, this Consent Agreement and Final Order states that Mr. Kerivan and Bridgeview Vineyards, Inc. "waive any right to contest the allegations or to appeal the Final Order once it becomes final." Mr. Kerivan paid the penalty in January 2006, and EPA considers the matter to be closed.

As you may be aware, on June 19, 2006, the U.S. Supreme Court issued a decision in *U.S. v Rapanos*, in which the Court enunciated two tests for determining whether there is Clean Water Act jurisdiction in cases involving waters that are not traditional navigable waters. In *Rapanos*, all members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense, but disagreed on the scope of the term and issued a series of plurality, concurring, and dissenting opinions.

In February 2007, Mr. Kerivan called Deborah Hilsman, the Assistant Regional Counsel who represented EPA in the enforcement case, asking about interim guidance issued by the U.S. Army Corps of Engineers (Corps) and EPA on implementing the *Rapanos* decision. At that time, Ms. Hilsman informed Mr. Kerivan that EPA had not yet issued final guidance concerning the implementation of the *Rapanos* decision, but that at any rate, Sucker Creek would be considered jurisdictional under either of the two tests for Clean Water Act jurisdiction under *Rapanos*. Sucker Creek is a relatively permanent or continually flowing body of water that is connected to the Illinois River, a navigable-in-fact body of water. Sucker Creek and its adjacent floodplains also have a significant nexus to the Illinois River. As such, Sucker Creek is a "water of the United States" under the Clean Water Act and EPA had a jurisdictional basis for bringing the enforcement action against Mr. Kerivan and Bridgeview Vineyards, Inc. EPA sees no basis for setting aside the settlement agreement and returning Mr. Kerivan's penalty payment to him.

If you or your staff has any other questions concerning this matter, then please contact Ms. Hilsman at 206-553-1810.

Sincerely,



Elin D. Miller  
Regional Administrator

Enclosure

cc w/enc: Robert Kerivan